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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Arturo Barrera,

10 Plaintiff,

11 v.

12 Honor Health Emergency Center –  
13 Deer Valley,

14 Defendant.

No. CV 21-01658 PHX CDB

**REPORT AND  
RECOMMENDATION**

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16 **TO THE HONORABLE STEPHEN M. McNAMEE:**

17 Plaintiff, who proceeds pro se, has filed a motion seeking leave to proceed *in*  
18 *forma pauperis* pursuant to 28 U.S.C. § 1915(a). (ECF No. 2).<sup>1</sup> Accordingly, his  
19 Complaint is subject to *sua sponte* review, and the Complaint is also subject to  
20 mandatory dismissal if it is “frivolous, malicious,” or fails to state a claim upon which  
21 relief may be granted.” 28 U.S.C. § 1915(e)(2)(B). *See also Coleman v. Tollefson*, 135 S.

22 <sup>1</sup> Granting or denying a motion to proceed *in forma pauperis* is a matter left to the  
23 Court’s discretion. *See, e.g., Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998). Such  
24 a motion may be granted when the plaintiff has established their indigency and docketed a  
25 complaint which presents at least one nonfrivolous claim. *See, e.g., Smith-Bey v. Hospital Adm’r*,  
26 841 F.2d 751, 756-57 (7th Cir. 1988). When a non-prisoner seeks leave to proceed on a civil  
27 complaint without the prepayment of fees pursuant to 28 U.S.C. § 1915, the applicant is required  
28 to submit an affidavit that sets forth his income and assets and attests to the applicant’s inability  
to pay the requisite fees. *See* 28 U.S.C. § 1915(a). Plaintiff alleges he has no income and no  
assets. Accordingly, Plaintiff has established that he lacks the financial ability to pay the filing  
fee.

1 Ct. 1759, 1763 (2015). Section 1915(e) “not only permits, but requires, a district court to  
2 dismiss an *in forma pauperis* complaint that fails to state a claim.” *Lopez v. Smith*, 203  
3 F.3d 1122, 1127 (9th Cir. 2000).

4 Because upon screening it appears the Court is without jurisdiction to hear  
5 Plaintiff’s claims for relief, a decision on the motion to proceed *in forma pauperis* is  
6 dispositive. Accordingly, the undersigned makes the following proposed findings of fact,  
7 report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases,  
8 Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2),  
9 Local Rules of Civil Procedure.

10 Screening under § 1915(e)(2) is performed under the same standard of review as  
11 Federal Rule of Civil Procedure 12(b)(6). *See Wilhelm v. Rotman*, 680 F.3d 1113, 1121  
12 (9th Cir. 2012). Under Rule 12(b)(6), a complaint must “contain sufficient factual matter,  
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
14 556 U.S. 662, 678 (2009), *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
15 A complaint that fails to allege a cognizable legal theory or alleges insufficient facts  
16 under a cognizable legal theory fails to state a plausible claim for relief. *See UMG*  
17 *Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). The  
18 Court must liberally construe a pro se plaintiff’s pleadings. *E.g., Hebbe v. Pliler*, 627  
19 F.3d 338, 342 (9th Cir. 2010). However, although the Court must accept as true  
20 allegations of material fact, it is “not bound to accept as true a legal conclusion couched  
21 as a factual allegation.” *Wood v. Moss*, 572 U.S. 744, 755 n.5 (2014).

22 To be allowed to proceed on a complaint, the plaintiff must establish the Court’s  
23 jurisdiction over their claim(s). A plaintiff may establish the Court’s subject matter  
24 jurisdiction in one of two ways. First, the plaintiff may assert that the defendant violated  
25 the Constitution, a federal law, or treaty of the United States, i.e., the Court’s “federal  
26 question” jurisdiction. *See* 28 U.S.C. § 1331. Alternatively, a plaintiff may invoke the  
27 Court’s “diversity” jurisdiction, which applies “where the matter in controversy exceeds  
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1 the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of  
2 different States.” 28 U.S.C. § 1332(a)(1).

3 Plaintiff asserts the Court has federal question jurisdiction over his claims, citing  
4 only 22 U.S.C. § 2702. (ECF No. 1 at 3). The factual basis for Plaintiff’s claim is as  
5 follows:

6 On 9/20/21, and 9/24/21, respectively, I went to the Honor Health  
7 Emergency Center – Deer Valley and complained of extreme pain because I  
8 was drugged, tortured, and raped. The medical staff are involved in a  
9 sophisticated ongoing conspiracy, which constitutes a criminal terrorist  
organization to deprive me of my rights, and they refused to treat me.

10 (ECF No. 2 at 4).

11 In his prayer for relief, Plaintiff states:

12 I am seeking monetary damages (unspecified) and criminal sanctions, if at  
13 all possible. I am seeking an injunctive order for the emergency room to  
14 operate on my left clavicle and for a blood toxicology [sic] exam and an  
entire Ct-scan and MRI of my entire body because I am a victim of a  
15 complex conspiracy and I am being tortured an[d] the doctors/hospital is  
refusing to do the imaging of my soft tissue and nerves.

16 (*Id.*).

17 The Complaint fails to establish the Court’s subject-matter jurisdiction. Section  
18 2702 pertains to actions for malpractice purportedly committed by physicians who work  
19 for the United States Department of State or any other federal department, agency, or  
20 instrumentality. *See* 22 U.S.C. § 2702(a). There is no indication in the Complaint, nor  
21 could it plausibly allege, that the “medical staff” of Honor Health work for the  
22 Department of State or any other federal department, agency or instrumentality. Plaintiff  
23 also fails to satisfy the requirements for subject matter jurisdiction on the basis of  
24 diversity of citizenship, as the sole named defendant is an entity located and presumably  
25 incorporated in Arizona and Plaintiff is a resident of Arizona.

26 If a pro se plaintiff can cure the factual allegations in their complaint to sustain a  
27 finding of subject matter jurisdiction, the Court may give them leave to do so. However,  
28 if repleading cannot cure the deficiencies, the Court may dismiss a complaint

1 accompanied by a motion to proceed *in forma pauperis* with prejudice. *See Cato v.*  
2 *United States*, 70 F.3d 1103, 1106 (9th Cir. 2005); *Eminence Capital, LLC v. Aspeon,*  
3 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Lopez*, 203 F.3d at 1129. Because Plaintiff is  
4 unable to allege a proper basis for the Court's jurisdiction over his claims against a  
5 private Arizona hospital for the failure to treat Plaintiff's non-life threatening injuries,

6 **IT IS THEREFORE RECOMMENDED that** Plaintiff's complaint be  
7 **dismissed** with prejudice for failure to allege subject matter jurisdiction.

8 **IT IS FURTHER RECOMMENDED that** Plaintiff's motion for leave to  
9 proceed *in forma pauperis*, and his motions at ECF No. 5 and ECF No. 6 be **denied as**  
10 **moot**.

11 This recommendation is not an order that is immediately appealable to the Ninth  
12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal  
13 Rules of Appellate Procedure should not be filed until entry of the District Court's  
14 judgment. Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have  
15 fourteen (14) days from the date of service of a copy of this recommendation within  
16 which to file specific written objections with the Court. Thereafter, the parties have  
17 fourteen (14) days within which to file a response to the objections. Pursuant to  
18 Rule 7.2(e)(3), Local Rules of Civil Procedure for the United States District Court for the  
19 District of Arizona, objections to the Report and Recommendation may not exceed ten  
20 (10) pages in length.

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1 Failure to file timely objections to the Magistrate Judge's Report and  
2 Recommendation may result in the acceptance of the Report and Recommendation by the  
3 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,  
4 1121 (9th Cir. 2003). Failure to file timely objections to any factual determinations of the  
5 Magistrate Judge may be considered a waiver of a party's right to appellate review of the  
6 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's  
7 recommendation. *See Fed. R. Civ. P. 72*.

8 Dated this 5th day of October, 2021.

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Camille D. Bibles  
United States Magistrate Judge